U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

DATE: SEP 18 2013 OFFICE: TEXAS SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The matter is now before the AAO on appeal. The AAO will dismiss the appeal.

The petitioner seeks classification under section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks employment as a secondary school science teacher in Maryland. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a brief from counsel and copies of standardized test results.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. –
>
> > (A) In General. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer –
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990, published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now U.S. Citizenship and Immigration Services (USCIS)] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

In re New York State Dept. of Transportation (*NYSDOT*), 22 I&N Dec. 215 (Act. Assoc. Comm'r 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, the petitioner must show that the alien seeks employment in an area of substantial intrinsic merit. Next, the petitioner must show that the proposed benefit will be national in scope. Finally, the petitioner must establish that the alien will serve the national interest to a substantially greater degree than would an available United States worker having the same minimum qualifications.

While the national interest waiver hinges on prospective national benefit, the petitioner must establish that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The intention behind the term "prospective" is to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

The USCIS regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

The petitioner filed the Form I-140 petition on September 16, 2012. In an introductory statement, counsel noted an increased emphasis on science, technology, engineering and mathematics (STEM) education in the United States, and stated that the petitioner's "petition for waiver of the labor certification is premised on her Masters Degree in Science Education, about thirty (30) years of dedicated and progressive teaching experience in Science Education, the awards and recognitions received by her, among others."

Academic degrees, experience and institutional recognition (such as awards) are all elements that can contribute toward a finding of exceptional ability. *See* 8 C.F.R. §§ 204.5(k)(3)(ii)(A), (B) and (F), respectively. Exceptional ability, in turn, is not grounds for the waiver. *See* section 203(b)(2)(A) of the Act. Particularly significant awards may serve as evidence of the petitioner's

impact and influence on her field, but the petitioner did not demonstrate the significance of the awards documented in the record.

Counsel's exhibit list identified 26 "Awards and Recognitions," four of which have no connection to education. Instead, they relate to the petitioner's volunteer work with veterans, Boy Scouts and Girl Scouts, and registering voters in the Philippines. Education-related recognition included confirmation that she served as a science fair judge and gave speeches and demonstrations at professional gatherings. Her work for yielded certificates of appreciation for her work on the occasion of her departure from and in conjunction with American Education Week 2006.

Counsel stated that the petitioner "has the heart and determination" for "helping the nation improve the education of children in Science (STEM) Education." Counsel did not identify any national-level improvements, either in the United States or in the Philippines, that have previously resulted from the petitioner's work.

The petitioner submitted witness letters from faculty, administrators, and students at various schools in the United States and in the Philippines where the petitioner has taught. These witnesses praised the petitioner's abilities as an educator, but did not indicate that the petitioner's work has had, or will have, an impact outside of the classrooms and local school systems that have employed her.

The director issued a request for evidence on July 3, 2012, stating: "The record does not contain significant first-hand documentary evidence to corroborate the importance and influence of the petitioner's work." In response, the petitioner submitted her "Action Plan For Addressing the Critical Needs of Science Education in the U.S." In that statement, the petitioner stated that she seeks "to bring science education closer to citizens and put responsible science and culture at the heart of the students," to "increase the likelihood of them enrolling in science courses at the high school level." The petitioner discussed her educational strategies at the classroom level and stated her intention to continue to "attend professional development carriers."

The petitioner submitted background materials about the need for improvement in STEM education in the United States. These documents establish the substantial intrinsic merit of STEM education, but they do not give national scope to the work of one STEM teacher or establish that the petitioner's impact and influence warrant the national interest waiver.

Counsel stated:

> Since a 'National Mathematics Teacher' [*sic*] is not even a real concept but more of metaphysical cognition [*sic*], undersigned wishes to once again posit a realistic proposition upon which to establish that the self-petitioner's contributions will impart national-level benefits.
>
> Even the curricula used by each state education department in the United States vary from each other.

> In other words, since not all NIW cases are based on prevailing Acts of United States Congress, it is but harmless to assert that if an NIW Petition is made with premise on some prevailing Acts of United States Congress, that by itself renders the proposed employment national in scope.

The petitioner is a science teacher, not a mathematics teacher. Further, there is no basis to conclude that Congress, by mentioning a given occupation in legislation unrelated to immigration, exempted workers in that occupation from the job offer requirement that Congress enacted in the INA. Counsel cited legislation and policy initiatives that put special emphasis on education, especially in STEM subjects. Counsel emphasized the No Child Left Behind Act (NCLBA), 20 U.S.C. § 7801. Of these initiatives, the only identified statute that specifically addressed immigration was the Immigration Act of 1990 (IMMACT 90) (Pub.L. 101–649, 104 Stat. 4978, November 29, 1990). IMMACT 90 created the national interest waiver, but also (1) identified teachers as members of the professions and (2) specified that members of the professions holding advanced degrees are, as a rule, subject to the job offer requirement. Counsel, therefore, claims an intent behind the legislation that is at odds with the plain wording of that same legislation.

Counsel contended that the labor certification process cannot meet the nation's needs because school teachers "require only a bachelor's degree," and therefore labor certification "would not meet the objective of employers to hire highly qualified teachers pursuant to No Child Left Behind." Counsel stated: "Section 1119 of the No Child Left Behind Act (NCLB) establishes the qualifications for teachers and paraprofessionals." Counsel then quoted the section of the NCLBA that defines a paraprofessional, but not the part that defines the term "highly qualified teacher."

Section 9101(23) of the NCLBA defines the term "highly qualified" in reference to teachers. Sections 9101(23)(B) and (C) of the NCLBA require that a "highly qualified" teacher "holds at least a bachelor's degree." Because the NCLBA defines a teacher with a bachelor's degree as "highly qualified" (provided the teacher meets other specified requirements), the labor certification process does not thwart the NCLBA by setting the minimum degree requirement at a bachelor's degree rather than a master's degree.

Counsel stated that labor certification "covers only the education and work experience qualifications" of job applicants, and that "even if two (2) teachers have exactly the same education degrees and work experience, their effectiveness cannot be identical." Therefore, counsel concluded, "the labor certification process would not in any way [yield] an identically effective Science teacher as" the petitioner. This assertion rests on the unsupported presumption that the petitioner is superior to every qualified United States worker who may seek her position.

Counsel claimed that the labor certification process is redundant because has already hired the petitioner, and would have fired her if her performance had been unsatisfactory. The same reasoning applies to every worker employed in the United States as a nonimmigrant, but it does not mean that labor certification applies only to prospective immigrants who are not yet working in the United States.

Counsel contended that, under the NCLBA, schools that fail to meet specified benchmarks will lose federal funding and be "abolished," thereby putting the teachers out of work, and therefore United States teachers have an incentive to waive the labor certification requirement for highly qualified teachers. It does not follow that Congress intended the NCLBA as a blanket waiver for teachers, a result that appears nowhere in the language of that statute.

Counsel again listed various certificates that the petitioner received, and asserted that these materials "established her influence" and therefore "cannot just be ignored." Counsel did not explain how any of the materials demonstrated the petitioner's impact on education beyond the local level.

The director denied the petition on December 18, 2012, because the petitioner had met only the "substantial intrinsic merit" prong of the *NYSDOT* national interest test. On appeal, the petitioner submits copies of results from the Maryland School Assessment tests in reading and mathematics. The petitioner teaches neither of those subjects, and counsel does not explain the relevance of the submitted data.

Counsel asserts that the director gave "insufficient weight to the national educational interests enunciated in the No Child Left Behind Act of 2001." Counsel asserts that the original statutory and regulatory provisions are unclear regarding the requirements for the waiver, and that Congress resolved this "obscurity" by passing the NCLBA three years after the publication of *NYSDOT* as a precedent decision. Counsel claims that "the NCLB Act and the Obama Education Programs, taken collectively, provide the underlying context for the adjudication of a national interest waiver application made in conjunction with an E21 visa petition for employment as a Highly Qualified Teacher in the public Elementary School Special Education sector." (The petitioner has never claimed to be an elementary school special education teacher.) Counsel, however, identifies no specific legislative or regulatory provisions that exempt school teachers from *NYSDOT* or reduce its impact on them.

Contrary to counsel's assertion that the NCLBA modified or superseded *NYSDOT*, that legislation did not amend section 203(b)(2) of the Act or otherwise mention the national interest waiver. In contrast, section 5 of the Nursing Relief for Disadvantaged Areas Act of 1999, Pub.L. 106-95 (November 12, 1999), specifically amended the Immigration and Nationality Act by adding section 203(b)(2)(B)(ii) to that Act, to create special waiver provisions for certain physicians. Because Congress not only can amend the Act to clarify the waiver provisions, but has in fact done so in direct response to *NYSDOT*, counsel has not established that the NCLBA indirectly implies a similar legislative change.

Counsel states:

> With respect to the E21 visa classification, INA § 203(b)(2)(A) provides in relevant part that: "Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit

> prospectively the **national . . . educational interests**, . . . of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

Counsel, above, uses bold type to highlight the phrase "national . . . educational interests," but the very same quoted passage also includes the job offer requirement, *i.e.*, the requirement that the alien's "services . . . are sought by an employer in the United States." Counsel has, thus, quoted the statute that supports the director's conclusion. By the plain wording of the statute that counsel quotes on appeal, an alien professional holding an advanced degree is presumptively subject to the job offer requirement, even if that alien "will substantially benefit prospectively the national . . . educational interests . . . of the United States." Congress has not amended the Immigration and Nationality Act to remove the job offer requirement for teachers. The existence of legislation recognizing the importance of education does not nullify legislation that specifically holds members of the professions (including teachers) to the job offer requirement that Congress created and has never repealed.

Counsel asserts that the petitioner qualifies for the waivers even within the confines of *NYSDOT*, "because of her effective role in pursuing the NCLB Act's goal and in implementing the Obama administration's education initiatives." Counsel, however, cites no evidence of the petitioner's impact outside of a handful of schools in [redacted] Local actions undertaken in pursuit of national policy goals do not, themselves, necessarily yield benefits that are national in scope. Counsel does not claim or demonstrate that the petitioner's work has had a nationally perceptible effect on STEM education.

Counsel asserts that there remains a pressing need for educational reform, because past efforts such as Teach For America have not produced satisfactory results. This is a general claim that addresses the intrinsic merit of the petitioner's profession, but does not establish that the petitioner, in particular, qualifies for the waiver.

Counsel contends "the Immigration Service is requiring more from the beneficiary's credentials and tantamount to having exceptional ability," even though one need not qualify as an alien of exceptional ability in order to receive the waiver. As noted previously, the threshold for exceptional ability is below, not above, the threshold for the national interest waiver. It remains that the petitioner's evidence does not establish eligibility for the national interest waiver. The director did not require the petitioner to establish exceptional ability in her field. Instead, the director found that the petitioner's evidence failed to establish that her work has had an influence beyond the school districts where she has worked.

By statute, engaging in a profession (such as teaching) does not presumptively entitle such professionals to the national interest waiver. Congress has not established the existence of any blanket waiver for teachers. Eligibility for the waiver rests not on the basis of the overall importance of a given profession, but rather on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The AAO will dismiss the appeal for the above stated reasons. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, the petitioner has not met that burden.

ORDER: The appeal is dismissed.